U. S. Copyright Office

Examining Division

Annual Report for Fiscal Year 2006

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INTRODUCTION

During Fiscal Year 2006 the Examining Division handled 541,842 claims; this total includes 70,373 claims processed during overtime hours. The Division began the year with 52,608 claims on hand. The amount of work on hand fluctuated somewhat during the year, and was impacted most directly by cross training of examiners in the Cataloging Division and our July move to Crystal City. We ended the year with 21,713 claims on hand, this low number being primarily the result of the fee increase and reduced deliveries of claims to the Examining Division from the Materials Control Section because of insufficient fees. Additional work on hand was as follows: Pending correspondence - 1,468; Reply cases - 1,490; Letters to be prepared by the Correspondence Unit - 403. In addition to maintaining currency in examining claims, the Division was focused primarily this year on cross training of examiners and catalogers for re-engineering and our temporary move to Crystal City.

Statistics related to the processing of First Appeals are as follows:

First appeals received and handled: 239, involving 465 claims
Claims accepted on appeal: 117
Claims rejected on appeal: 348
First appeals on hand and not yet resolved: 82

PART I - NEW DEVELOPMENTS

Cross Training of Examining and Cataloging Staff

Initially, it was the intention of the Office to cross train examiners to catalog claims and catalogers to examine claims, in preparation for the merging of the two divisions under re-engineering. In general, the staff was to be divided into equal groups, each of which would be detailed to the complementary division for four months. After a staff member's detail ended, he/she would spend up to twelve hours each week in followup training to both reinforce the new skills and learn additional skills.

Beginning in October 2005, seven examiners and seven catalogers were detailed. This initial detail lasted five months. The second round of details, involving six examiners and six catalogers, began in March and lasted four months. During the second round, the Register announced significant changes in the rules for cataloging claims; consequently, it was determined that a four-month detail for examiners to learn the new rules was unnecessary. Thus, beginning in July and the third round of training, only catalogers were detailed to the Examining Division. To assist the Cataloging Division in handling its workload with the reduced staff, Examining detailed examiners who had already been trained in cataloging rules, to that Division.

Catalogers who handle visual arts materials did not participate in the first detail. Instead, as a group, they received classroom training over a period of weeks in the substantive areas of examining, with minor attention being given to actual claims. The catalogers from Performing Arts and Literary, on the other hand, were given training very similar to that delivered to new examiners with no previous Copyright Office experience.

The training load for the Literary Division is especially heavy; Visual Arts also has a relatively heavy load. The number of catalogers to be trained in the Performing Arts Section, however, is relatively small because of the requirement that examining staff there be able to read and analyze music. (This will continue to be a requirement for specialists working in the Performing Arts Division under re-engineering.) Not all of the staff who presently catalog music and sound recordings have the requisite musical background; those who do not had to choose an alternative section in which to be trained, either Literary

or Visual Arts, or they had the option of selecting the Motion Picture Team. The total number of Cataloging Division staff to be trained in each section is as follows: Literary Section: 31 catalogers, 5 supervisors; Visual Arts Section: 13 examiners, 1 supervisor; and Performing Arts Section: 6 examiners and 2 supervisors.

The Division began cross training the supervisory staff of the Cataloging Division in mid-October 2006. The initial session was a lecture created and delivered by John Ashley, head of the Visual Arts Section. It focused on the broad substantive information that staff must have in order to examine claims - key statutory provisions, definitions, basic principles, etc. This will be followed up by section-specific training for at least eight hours each week for each supervisor.

Susan Todd, head of the Literary Section in the EXD, is the overall coordinator and director of training on the examining side.

Process Administrators

Copyright Office management personnel and personnel representing SRA met at the Airlie Conference Center in February to discuss a number of issues related to re-engineering. One issue that rose to the surface was that of communication among all the parties involved in the process. It was agreed that each Process Owner needed an assistant who could act as a liaison with SRA; was up to date at least in a general way on all fronts of re-engineering; and could attend meetings, take notes and brief the PO if he/she was not present at the meeting. Thus was born the idea of the Process Administrator.

Stephen Oswald, a senior examiner on the Motion Picture Team in the PA Section, was selected for this role in the Examining Division. Stephen was the first examiner involved in the Motion Picture Pilot and has developed a fine knowledge of the Siebel system, which will be used for processing claims under re-engineering. Among the most important projects he and Chief Jim Vassar have been involved in are defining the requirements for the application forms and designing screen and help text for the registration program. Stephen has worked very closely with the Process Administrator for the Cataloging Division, Gayle Cole Croom, in all his endeavors.

Move to Crystal City

Planning for our move to Crystal City, in order to allow our space in the Madison Building to be redesigned for re-engineering, began many months before the actual move occurred. The key to our successful move was the appointment of Move Champions, several in each section, who facilitated the packing and moving of section materials such as pending claims, and who also assisted in planning for and packing each staff member's personal desk and workspace items. They also worked at Crystal City during the weekend of the move (over the July 4 holiday).

In general, the move went extremely well for the Examining Division. Although management had anticipated that staff might not be settled enough to accomplish any real work for at least a week, in fact the staff moved in very quickly and efficiently, thanks to superb planning, and began working in earnest within a day or two of the move. We did not experience an inordinate rise in our workload as a result of the move.

Visual Arts Section head John Ashley acted as overall supervisor and liaison with Administrative Office staff for the move.

Preregistration

Preregistration was designed as an online system for making a public record of a work in progress for certain categories of works. The system was implemented on November 15. When a remitter completes the online application and submits an appropriate fee (no deposit of the work is required), the Copyright Office issues a Notification of the preregistration in electronic form. This Notification is primarily a "ticket to court" in cases where a work is infringed before its authorized release or publication.

The online application is examined and cataloged in Siebel. Staff received some training in working in the Siebel system from SRA personnel, but more significant training and assistance from staff in CTO and Stephen Oswald, the Process Administrator for the EXD. Only a few examiners and catalogers were selected to handle these claims; management selected staff who were in the process of being cross trained, so that each person would be able to both examine and catalog each claim A review

of only the cataloging aspect was considered necessary; thus, until the end of the fiscal year, each claim was reviewed by a cataloging supervisor before the Notification was issued. (**NOTE**: The cataloging review step was eliminated at the end of FY 06.)

Although we encountered a number of problems that impacted the timely issuance of Notifications, by the end of the fiscal year, the system was working fairly smoothly and our timeliness in issuing Notifications had improved, standing at about one calendar week for turnaround where there was no problem with the application or fee. As of September 30, we had received 333 preregistrations.

Assistant Division Chief Linda Gill is the supervisor for preregistration.

End of 28-year renewals

As of January 2006, it was no longer possible to file an application in the Copyright Office for timely renewal of a work first published under the 1909 Act (i.e., renewal during the last year of the first term of copyright protection for works published on or before December 31, 1977). Under a 1992 revision of the 1976 Act, a work published between January 1,1964 and December 31, 1977, with a proper notice of copyright is entitled to two terms of statutory copyright protection, without the need to register or renew the work in the Copyright Office. There is a provision, however, for filing a renewal claim in the Copyright Office at any time during the 67-year renewal term for a work, although such filing does not provide the range of benefits available to those works for which a timely filing had been made.

Jane Rinard, supervisor for handling renewal claims, designed an application form that will be easier for remitters to complete for renewal term registration. This application form should be adopted for use by the Office in the near future, once a revised regulation, written by Nanette Petruzzelli in consultation with Ms. Rinard and Linda Gill, has been promulgated.

Performing Arts and Renewals Sections merged

Although the Renewals Section will not lose its separate section status until re-engineering is implemented, it has been operating as a team within the Performing Arts Section for supervisory and administrative purposes for a number of years. During FY 2006, the merger of the two sections took another step forward when the staff of the PA Section was redistributed and some examiners were placed on the Renewals "Team." These examiners continued to handle only works of the performing arts, and the team was re-designated at Team C of the Performing Arts Section. It has a dual role, to examine all the renewals claims, and a proportionate share of performing arts materials (music, screenplays, sound recordings, etc.).

Increase in receipt of work published online; Unit of publication

The number of online works, especially works published exclusively, or initially, online, continued to increase. The Literary Section has received several claims in blogs, which involve questions of authorship and ownership (because some of the contributions may have been created by someone other than the person in whose name the claim is filed), as well as of the date and unit of publication.

The Performing Arts Section has received a number of claims in both musical compositions and sound recordings that are available only online at the time of registration. Some of these cases have raised questions about the unit of publication. For example, an application from a large record company listed 8 songs published online. The continuation sheet identified certain tracks as being exclusive to various online music services, called "business partners" by the industry. Other tracks were not exclusive. Six of the tracks were by one performing group and two were by a different performing group. The company explained that it placed the tracks on their server anywhere from two days to two weeks prior to each business partner's scheduled release date. The partners are provided access to the server using unique usernames and passwords; they may access any non-exclusive tracks, plus their own exclusive tracks, in this way. In another case, the PA Section received an application from a large record company for a sound recording (multiple tracks) and a photograph, both available as downloads. The tracks and

artwork were made available on a modular basis, that is, one could download various combinations of tracks and artwork.

No final decision about the appropriate manner of registration for these works has been made; the general issue of unit of publication is currently under discussion with the General Counsel and the Register.

PART II - SUBSTANTIVE REPORT

Visual Arts Section: Forms CA to change basis of claim

The Visual Arts Section received Form CA applications from several companies (including two of their most frequent remitters, Frank Betz Services, Inc., and Home Design Services, Inc.) seeking to change the basis of a number of claims as originally filed from "technical drawing" to "architectural work." The Section refused registration on Form CA, and suggested instead that the remitters file new registrations on Forms VA.. Under the regulation at 37 CFR 202.11(c)(4), which reads, "Where dual copyright claims exist in technical drawings and the architectural work depicted in the drawings, any claims with respect to the technical drawings and architectural work must be registered separately," a remitter cannot combine these two elements on the same application. The Section reasoned that, because the original claims based on "technical drawing" had not been in error, it was not appropriate for us to process the Forms CA, a form designed to correct and/or amplify an earlier registration. Further, it seemed likely the request was based on the remitter's desire to establish an earlier Effective Date of Registration for some architectural works because of pending litigation.

The issue of whether such claims should be refused is currently under discussion by the EXD and the General Counsel.

VA Section: Madame Puppet

The estate of the late author and famed puppeteer Wayland Parrot Flowers filed a claim in the "Madame Puppet" character as an unpublished work. A world-renowned puppet-character used in public performances and the subject of media coverage and telecasts, the section thought it reasonable to assume that the sculpture had been published in a number of ways under either the 1909 Act or the 1976 Act. In written correspondence, the VA Section questioned whether the assertion that the work had in fact remained unpublished since its creation in 1960 was correct. The case is still pending.

Literary Section: Doc Savage

DOC SAVAGE. Disruptive Publishing tried to record an affidavit in the Copyright Office, asserting ownership of 506 individual titles of the Doc Savage and Shadow magazines by virtue of adverse possession. The affidavit included legal papers indicating that the copyright owners of the magazines were engaged in a copyright infringement suit with the publisher. The General Counsel's office sent a letter to the publisher stating that the Copyright Office does not recognize the doctrine of adverse possession as applying to copyrights. Nonetheless, the Office was willing to record the document if the company sent the appropriate fee for doing so. Rather than submitting a sufficient fee for recordation, however, the publisher submitted a claim on Form TX to register a claim in the compilation of, and additions and revisions to, the Doc Savage and Shadow magazines. To register a claim in a work incorporating previously copyrighted works, permission to use the original works must have been obtained. Because the remitter would not affirm that he had permission from the actual owners to prepare this derivative work, but instead continued to press his case on the adverse possession basis, the Office rejected the claim.

Performing Arts Section: Deposit to register music videos

Sony/BMG merged with Zomba and acquired over 1145 music videos in the process. The company wanted to register the videos but because of the sheer physical volume of the works, inquired whether they could register using a hard drive as the deposit, under the special relief provision. Alice Parrish, supervisor on the Motion Picture Team, consulted with the Examining Division Office and received approval for the special relief request. She also consulted with the automation specialist in M/B/RS, who worked with Amy Bracco of SONY/BMG. The resolution was that SONY/BMG was able to register using a hard drive as the deposit.

PA Section: Bill Graham Archives

The PA Section received about 100 claims in sound recordings from the Bill Graham Archives, LLC. Bill Graham, aka Wolfgang Grajonca, was an influential rock concert promoter in the 1960s and 70s, with venues in San Francisco and New York City. The artists featured included Bob Dylan, Led Zeppelin, Jimi Hendrix, and Jefferson Airplane, among others. Many of the recordings were made before 1972, and the claims for these works are in remixing and editing. Information on the Archives website, however, indicates that the recordings, many of which are currently available as a radio stream from the website, have not been revised in any way. Apparently, CDs and DVDs of these concerts are being planned.

The question for the Section was whether or not the sound recordings had been made with the permission of the performers. If the fixation of a sound recording is not made by or under the authority of the author (in this case, a performer), the PA Section rejects the claim on the basis of the definition of "fixation" in section 101, as well as the language in section 102(a), of the statute. In the present case, neither the original recordings, nor the derivative versions, would be registrable if not made with the permission of the author.

The attorney for the remitter initially objected to our inquiring into the question of permission but later send new applications which state the recordings were made under the authority of the performers. The claims will be cleared.

PA Section: All the Music

The PA Section registered a work entitled <u>All the Music</u> by Richard Westbrook. A month later, Mr. Westbrook sent a letter to the Copyright Office informing us that his work contained all possible combinations of the 12 tones of the chromatic scale. He stated that any future musical compositions would be derivative versions of his work and would need to be licensed through him. Because of his letter, we re-examined his work. We determined that his work had been generated by formula (in this case, computer software) and consisted of an exhaustive collection of 12-note pitch sequences. The work

did not contain any rhythmic or harmonic component. Because of its formulaic nature, the work did not contain sufficient original melodic expression; further, because the work contained all possible combinations of 12 pitches, it did not represent original compilation expression. The Section wrote to Mr. Westbrook informing him of the Office's intention to cancel his registration. He responded with a letter objecting to the cancellation. The case is still pending.

PA Section: Peggy Sue

The PA Section received Special Handling Form CA applications for the song "Peggy Sue." The purpose of the filing was to add Buddy Holly as a co-author and his estate as a co-claimant to both the original and renewal registrations, which had been made in 1957 and 1985, respectively. Buddy Holly was not named as author on the original registration. Because the applications were not received during the original 28 year term of copyright, the Section was unable to process them. Facts of authorship for works published under the 1909 Act could be amended only during the original term because of the effect of authorship on ownership during the renewal term.

PA Section: Authorship of a sound recording

The PA Section received a claim in a sound recording of a confrontation between two people, during the course of which fixation the woman involved was murdered. The interactions between the murderer and victim were recorded by surveillance equipment on an adjoining house. The Form SR application named the victim as the author of the recording and her estate as the copyright claimant.

The Office refused registration, taking the position that we could not register a claim in sound recording unless the victim had been involved in directing the fixation of the sounds in some way. As of the end of FY 2006, there was no response from the remitter.

PA Section: I Can Dance

We received a claim in text and sound recording from a woman whose conversation with George Clinton had been recorded without her knowledge and was later incorporated into his hit song, "I Can Dance." Although she named herself and Clinton as the authors and claimants on the application, she asserted that the fixation of the recording was unauthorized. Because the Section does not consider a work fixed without permission of the author to be registrable, the Section declined to register the sound recording and asked the remitter to send a new application limiting her claim to her text and also to supply us with an authorized fixation of that text.

PA Section: Sound recording of calls from the World Trade Center on Sept. 11, 2001

The PA Section received a claim in sound recording from the City of New York for police and fire department telephone calls from the World Trade Center on September 11th. The recordings included only the response from the city employees; the sounds from the people calling in were bleeped out. The claim was registered without correspondence.

PART III - ADMINISTRATIVE REPORT

Staffing changes

Promotions: *To Assistant Division Chief* - Linda Gill

To Section Head, Lit. - Susan Todd

To Section Head, PA - Laura Lee Fischer

To Senior Examiner, PA - Roger Nunes and Stephen Oswald

To Team Leader, Lit. - Ted Hirakawa

To Examiner Trainee, VA - William Shuttleworth

To GS-11 Examiner (PA, Lit., and VA) - Roby Bissette, Laurie Meier, Rebecca Barker, Cynthia Hutchins, Kenneth "Sean" Thompson

To GS-8 Technician, Lit. - Samphas Tek

Examiners hired: Melissa Crawford (VA)

Hugh McIntosh (VA)

Cynthia Hutchins (VA)

Christy Chason (TX)

Daniel Schwarz (TX)

Wykesha Tripp (TX)

Melissa Bethel (PA)

Laura Norton (PA)

Trent Goldsmith (PA)

Other hires: Rashelle Butts, Administrative Support Assistant, Division Office

Resignations: Robyn Bissette, Examiner (Lit.)

Hugh McIntosh, Examiner (VA)

Retirements: Deloris Jackson, Correspondence Clerk

Lillian Fidler, Section Secretary (PA)

Transfers: Freda Duncan, Secretary to the Assistant Chief, DO, to Section Secretary (PA)

Sean Waldon, Automation Support for EXD (Contract employee) to CTO

Gwendolyn Roberts from CRS to Automation Support for EXD

Carl Hatchett and Debra Jackson from the Licensing Division to the EXD as Correspondence Clerks

Work study students: Janavia Harrell (resigned during first quarter)

Daryl Johnson (in 9/06, reassignment/conversion to GS-3 Service Support Assistant, NTE 1/1/07)

Norman Simms

Jonathan Ross (resigned during second quarter)

Gabrielle Burrell

Cortez Robinson

Temporary employee: Jonathan Hawkins, 120-day NTE (Correspondence Unit)

Details: *To the Cataloging Division for cross training:* Jim Shapleigh, Katrina Adams, Stephanie Mason, Desiree Woodard, Heather Martley, Otis McClees, Kim Robinson, Ed Timberlake, Carol Guglielm, Dennis Britton, Karin Sweet, Dan Haverstock, Kris Nelson, Micky Goldstein

To the Cataloging Division to assist with their workload: Jim Shapleigh, Kim Robinson, Michele Broussard, Dan Meyer

To cover vacancy in the Section Head position in the PA Section: Hugh Clark, Laura Lee Fischer, Alice Parrish, and Jane Rinard

To Assistant Division Chief: Linda Gill

To the MP Team from the PA Section: Ted Hirakawa

To the PA Section from the MP Team: George Weber

Examining Division staff as of September 30, 2006

Chief 1

Assistant Chief 1

Section Heads 3

Supervisors 9

Attorney Advisor 1

Senior Examiners 12

Examiners 59

Technicians 16

Administrative Support Asst. 1

Secretaries 3

Correspondence Unit Supervisor 1

Correspondence Clerks 6

Clerical Assistant 1

Support Services Assistant.....1

Work Study Students 0

Total 115

Vacancies as of September 30, 2006

Team Leader: 1; Examiners: 5; Technicians: 2; Correspondence Clerk: 1

Total.....9

Total on staff and vacancies.....124

Training

Internal Division training: Each section of the division hired three new examiners this year, for a total of nine. In addition to the intensive training these new staff received, the senior examiners and team leaders also continued to work with other trainee examiners who had not yet been promoted to the GS-11 position. Some examiners in the Literary Section also received CD-ROM and database training.

Cross training in examining and cataloging: Until he was promoted to the position of Team Leader in the Literary Section, Ted Hirakawa continued to train catalogers participating in the Motion Picture Pilot in examination procedures. Other Senior Examiners and Team Leaders throughout the division, especially in the Literary Section, devoted considerable time to delivering both the initial and followup training to catalogers who had been detailed to the EXD in preparation for the merging of the examining and cataloging functions under re-engineering. Further, VA Section Head John Ashley delivered a series of lectures to cataloging staff who will be working as specialists in the visual arts field over a period of several months. These lectures were general in nature, and focused on the authoritative sources we use in examining claims, broad principles of examination, including those related to court cases, and other general information that specialists will need to know under re-engineering.

Siebel training for preregistration: All preregistrations, which the Office began receiving and processing on November 15, 2005, are filed online using the Siebel system. EXD staff processing these claims (Dennis Britton, Linda Gill, Kim Robinson, and Sandra Ware) received rudimentary training in Siebel from SRA personnel; this was supplemented by assistance from CTO staff and Stephen Oswald.

Selection Pilot training: The entire staff of the VA Section received training in selection of visual arts materials for LOC. Immediately following the training, Examiners Ivan Proctor and Jim Shapleigh began participating in the EXD selection pilot, which began in the other two sections last year.

Security and emergency evacuation training: Bill Briganti served as the EXD's Office Emergency Coordinator. He and additional staff received training in appropriate procedures and protocols to provide security and safety for staff during emergencies.

Computer Security training: All staff of the division completed the mandatory computer security training.

The Respectful Workplace Workshop: All supervisory and managerial staff of the EXD took this training course in February.

Additional Staff Activities, Issues

Re-engineering conference, Airlie Retreat Center

In February, the following staff took part in this two-day conference, the purpose of which was to assess the status of re-engineering, define issues that were impacting the process negatively, and develop strategies for resolving them: Linda Gill, Alice Parrish, and Jim Vassar.

Assistance to other divisions:

In addition to formal details of several staff to the Cataloging Division, EXD personnel assisted the R & P Division and the Public Information Office throughout the year.

Re-engineering

In addition to cross training cataloging staff, the EXD was involved in re-engineering on a number of fronts, primarily through the work of the Process Administrators for the EXD Stephen Oswald and for the CATD Gayle Cole Croom. Along with Jim Vassar and other EXD staff designated as Subject Matter Experts (SMEs), they worked on the requirements for all the online application forms and the screen and help text needed for online registration. Alice Parrish and Linda Gill continued to attend the regular weekly transition meetings, at which representatives from each division affected by re-engineering met with SRA and IBM to discuss and resolve specific issues. Ms. Parrish continued to serve as the supervisor for the Motion Picture Pilot, and also as a member of the Award Fee Evaluation Board, charged with evaluating the work of SRA.

Sound Recordings - Derivative versions

Following a serious study of new technology that affects the preparation of derivative sound recordings, the PA Section revised some of its practices and guide letters to address the current issues more appropriately. For internal use, the Section also revised some of the definitions related to sound recordings in Chapter 400 of *Compendium II Copyright Office Practices.* In general, the revised guidelines address the copyrightability of remixed and reprocessed sounds, as it relates primarily to reissues of CDs in formats such as SACD, as well as the reissue of older recordings, many of which were originally monaural.

Kluge Nominating Committee

Literary Section Examiner Alden Almquist served on a committee of 29 staff, appointed by the Librarian's office, who were given the task of nominating and ranking candidates for the Library's million dollar Kluge Prize for lifetime achievement in the humanities and social sciences. The Librarian asked each committee member to identify and nominate two leading intellectual producers from around the world in his/her field of expertise and to write a brief biography and assessment of the nominee's work. Because one of Mr. Almquist's nominees was selected as a finalist, he was assigned to construct a dossier.

Guild and Union

Francine Mate continued to serve as Steward Director for the Copyright Office, ITS, ISS, the Librarian's office and the Law Library. by the staff, the section is revising its practices with regard to derivative sound recordings.

Problems created by radiation

The division has continued throughout the year to deal with many deposits, particularly CD-ROMs, CDs, and DVDs, damaged by radiation of mail delivered to the Copyright Office. Even though the R & P Division corresponds with applicants about deposits that are visibly beyond examination, many items with little or no visible damage are not playable. The problem with these items is thus not discovered until the works are examined. This has resulted in a considerable amount of correspondence to obtain undamaged deposits for our staff.

Outreach

First Quarter

Ingrid Bough participated in the National Book Festival as the U.S. Territories coordinator for the Pavilion of the States tables.

Second Quarter

Bill Briganti, Tean Leader in the VA Section, spoke at the monthly meeting of the Washington, D.C. chapter of the American Society of Media Photographers. The session focused on registration and preregistration issues.

Linda Gill, Assistant Division Chief, gave presentations on registration at "The Copyright Office Comes to California" conferences in Los Angeles and San Francisco.

Third Quarter

John Ashley, VA Section Head, represented the Copyright Office on the Librarian's Mentoring Task Force.

Linda Gill gave presentations on registration at "The Copyright Office Comes to New York" conference in New York City.

Fourth Quarter

Bill Briganti, John Ashley, and Senior Examiner Geoff Henderson, all of the VA Section, joined the Register and General Counsel in a meeting with a representative of the Semiconductor Industry Association. The topic of the meeting was a proposal to eliminate registration of mask works.